

- (1) Whether claimant's date of injury culminated before or after July 1, 1993.
- (2) What, if any, is the nature and extent of claimant's injury and/or disability?

- (3) What, if any, is the liability of the Kansas Workers Compensation Fund?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant was working for respondent in October 1992 as a sheet metal assembler when he began experiencing problems with his left elbow. The problems included pain, swelling, fever, and the development of a growth. The problems were reported to Central Medical at Cessna and claimant was sent to his own doctor, Dr. Leland Kaufman. Claimant returned to work the next day, went to first aid, and reported this as a workers compensation injury. Respondent then referred claimant to the company doctor, Dr. Rhodes, who referred claimant on to Dr. J. Mark Melhorn. During this period of time claimant began reporting problems to his right arm and shoulder. Claimant underwent conservative care for a period of time involving draining of the left elbow and also received a cortisone shot to the elbow. When these treatments proved unsuccessful claimant was recommended for left elbow surgery which he underwent on July 22, 1993, under the care of Dr. Perela-Cruz. Claimant was returned to work with respondent on October 5, 1993 and continues with respondent at this time.

The Appeals Board must first decide the date of claimant's accident. Claimant alleges accidental injury beginning in October 1992 when he first began experiencing the elbow problems and first started receiving treatment. Claimant further argues that a separate date of accident could be in February 1993 when claimant was moved to a different job while being treated by Dr. Melhorn. The Appeals Board finds it significant that, while claimant changed jobs in February 1993, he was under no restrictions by Dr. Melhorn and the job change was not necessitated by any recommendations by his treating physician. Claimant continued working a regular-duty job without restrictions and without missing work until July 22, 1993.

Two recent Kansas Court of Appeals cases address the determination of the date of accident where onset of injury is gradual. In Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), the Kansas Court of Appeals established a "bright line" rule when dealing with upper extremity carpal tunnel micro-traumas. In Berry the Court of Appeals found carpal tunnel to be a condition that could not logically be called either personal injury caused by accident or occupational disease. The Court felt the complexities involved in deciding the date of injury in a carpal tunnel case required simplification and further allowed for the adoption of a rule establishing a date of accident which causes the least amount of potential prejudice to future claimants. The Administrative Law Judge decided the "last day of work" was the appropriate date of injury or occurrence. In Berry, unlike here, claimant worked to a "last day" and then was unable to return to work with respondent. Here the claimant has returned to work at a comparable wage and continues in his employment with respondent. Thus, the bright line rule in Berry is not applicable to this situation.

In Condon v. The Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995), the Court of Appeals found in that certain situations that the "bright line" rule of Berry is not factually or legally applicable. In Condon the Court found that when a worker suffering from work injuries caused by micro-traumas, is laid off from work in a general lay off and not because of a medical condition, the date of injury is not always the last day worked. Condon does cite Berry as support for a holding that the last day worked can be modified in certain situations. In Berry, as cited by Condon, the Court specifically held:

"The date of accident or date of occurrence in a workers compensation action involving carpal tunnel syndrome is the last day on which a claimant performs services for his or her employer and is required to stop working as a direct result of the claimant's pain and disability resulting from the carpal tunnel syndrome." *Id.* at 587; Berry, *supra*, 20 Kan. App. 2d 220, Syl. ¶ 3.

This language from Berry, while not the "bright line" test of the "last day of work," does give direction to the Appeals Board regarding the date of accident appropriate to the current facts. The claimant continued working through July 22, 1993, when he was forced to leave work to undergo surgery. Thus, July 22, 1993, would be the last day on which the claimant performed services for his employer and was required to stop working as a direct result of claimant's pain and disability resulting from claimant's bilateral upper extremity symptomatology. While we are not dealing exclusively with carpal tunnel syndrome, we are nevertheless dealing with micro-trauma situations where a date of accident is difficult to establish. The Appeals Board finds, based upon the facts of this case, the logic of Berry as adapted by Condon is appropriate and July 22, 1993, is seen as claimant's date of accident, as it is the last day claimant performed services for his employer before he was required to stop working as a direct result of his pain and disability before the surgery. This case provides additional evidence of the difficulties involved in establishing dates of accident when dealing with micro-trauma situations, carpal tunnel, or otherwise.

The Appeals Board must next decide the nature and extent of claimant's injury and/or disability. Three opinions appear in the record concerning the nature and extent of claimant's injury. Unfortunately none of the opinions come from a treating physician but rather from independent medical examiners hired by various parties. Dr. Robert A. Rawcliffe, Jr., an orthopedic surgeon, performed an independent medical evaluation upon claimant on September 29, 1995, at request of respondent's attorney. Dr. Rawcliffe found claimant to have a 19 percent functional impairment to the left upper extremity involving the left shoulder and a 2 percent functional impairment to the left upper extremity involving the left elbow. Dr. Rawcliffe felt that claimant's symptomatology to his right upper extremities was temporary. The conversion chart contained in the American Medical Association's Guides to the Evaluation of Permanent Impairment, Third Edition, Revised (hereinafter The Guides) allows a 19 percent and a 2 percent upper extremity impairment to convert to a 21 percent upper extremity impairment.

Dr. James L. Gluck examined claimant on March 16, 1995, at the request of claimant's attorney. Dr. Gluck reviewed medical records, performed a physical examination, and provided his impression as to claimant's functional impairment. Dr. Gluck found claimant to have a 12 percent upper extremity functional impairment as a result of a left shoulder injury and an 11 percent upper extremity functional impairment as a result of the left elbow symptomatology. Dr. Gluck also found no functional impairment resulting from claimant's right upper extremity complaints. Using The Guides these functional impairments combine to a 22 percent upper extremity functional impairment.

Claimant was further examined during an independent medical examination by Dr. Paul D. Lesko on August 22, 1995, at the request of claimant's attorney. Dr. Lesko found claimant to have a 30 to 35 percent functional impairment in his left upper extremity as a result of his left shoulder complaints and a 20 percent functional impairment to his left upper extremity as a result of his left elbow symptomatology. Dr. Lesko went on to find an 8 to 10 percent functional impairment to claimant's right elbow as a result of the symptoms and complaints exhibited.

In proceedings under the Workers Compensation Act the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends. K.S.A. 44-501(a). K.S.A. 44-508(g) defines the burden of proof as follows:

“Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.”

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence presented in the case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The Appeals Board, as the trier of facts, must review the medical evidence provided by Dr. Rawcliffe, Dr. Gluck and Dr. Lesko and determine which is the more credible and the more persuasive. It is unfortunate when the parties elect to abandon the opinions of the treating physicians, instead presenting evidence from hired independent medical examiners. A treating physician would have the opportunity to evaluate an injured worker over a lengthy period of time and could develop an opinion based upon multiple examinations, tests, and a lengthy history of associating with claimant. Independent medical examiners are reduced to reviewing records of other physicians and generally have but one opportunity to examine and evaluate the claimant. As such, it becomes difficult for the trier of facts to place greater emphasis upon one medical opinion over another when independent medical examiners are all that are available. As such, the Appeals Board in reviewing the three opinions places the greater weight upon the opinions of Dr. Rawcliffe and Dr. Gluck regarding the involvement of claimant's right upper extremity. The preponderance of the credible evidence supports a finding that claimant has suffered no impairment to his right upper extremity and his injuries from this accident involve the left upper extremity only. In reviewing the functional impairment of claimant's left upper extremity, including the shoulder, the Appeals Board does take into consideration the functional impairments of all three physicians. On page 54 of The Guides it is recommended that the combined values chart found on page 254 be utilized when comparing upper extremity impairments in order to reach the proper functional impairment. In using The Guides as recommended the Appeals Board finds, based upon the opinions of Dr. Rawcliffe, Dr. Gluck, and Dr. Lesko, that claimant has suffered a 29.67 percent functional impairment to his left upper extremity, including the shoulder. In computing the award the Appeals Board applies the language of K.S.A. 44-510d(a)(13) which states:

"For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks."

The Appeals Board must next decide liability of the Kansas Workers Compensation Fund. In the arguments presented to the Board both the respondent and the Fund acknowledge the Fund's involvement stems from an injury to the claimant's right upper extremity. As there is no award based on an injury to claimant's right upper extremity, the Appeals Board finds the Kansas Workers Compensation Fund has no liability in this matter.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award Administrative Law Judge John D. Clark dated January 2, 1996, should be, and is modified in part.

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Terry L. Durham, who is granted an

award against the respondent, Cessna Aircraft Company, a qualified self-insured, for an injury occurring through July 22, 1993, for a 29.67% permanent partial impairment to the left upper extremity.

Claimant is entitled to 11 weeks temporary total disability compensation at the rate of \$313 per week totalling \$3,443, followed by 63.49 weeks permanent partial disability at the rate of \$313 per week, totalling \$19,872.37, for a total award of \$23,315.37 all of which is due and owing in one lump sum minus amounts previously paid.

The respondent is liable for this entire award with the Kansas Workers Compensation Fund being responsible for no portion of the award with the exception of its own attorney's fees.

The fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent to be paid directly as follows:

Barber & Associates	
Transcript of regular hearing	\$304.45
Deposition of Paul Lesko, M.D.	\$226.80
Court Reporting Service	
Deposition of James L. Gluck, M.D.	\$135.40
Deposition of Robert Rawcliffe, Jr., M.D.	Unknown

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 1996.

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BOARD MEMBER

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c: Stephen J. Jones, Wichita, KS  
Kirby Vernon, Wichita, Ks  
E. L. Lee Kinch, Wichita, Ks  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director